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Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

No. 72-1427

CLEMENT A. TAVARES
Petitioner
VERSUS
UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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for the Ninth Circuit

Petitioner prays that a writ of Certiorari issue to review the judgement herein of the United States Court of Appeals for the Ninth Circuit of January 30, 1974.

CITATION TO OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is not yet reported and is printed in Appendix, infra.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals for the State of California became final January 30,

1974 in case No. 72-1427. The jurisdiction of the Court has been invoked by Supreme Court rule 22 and 28 USC 1254. All issues here presented were raised below as indicated by the opinion in the Appendix.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION:

AMENDMENT IV The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated—

AMENDMENT V No person shall be — deprived of life, liberty or property without due process of law —

ARTICLE III Section 2 The judicial power shall extend to all cases in law and equity, arising under this Constitution and laws of the United States—

STATUTORY PROVISIONS INVOLVED

Internal Revenue Code (26 USC sec 6331)

(a) If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand it shall be lawful for the Secretary or

his delegate to collect such tax by levy upon all property and property rights belonging to such person.

QUESTION PRESENTED

Are the Constitutional Rights of Appellant Violated Herein By Summary Levy?

STATEMENT OF CASE

On August 4, 1971 appellant duly filed complaint for the taking by Appellee of $2109.61 from Appellant's account in the District Court of the United States for the Eastern District of California. Summary judgment was granted Appellee December 21, 1971. Appeal was filed January 3, 1972.

REASONS FOR GRANTING THE WRIT

I

NO ISSUE OF NEED FOR SECURITY OF JUDGMENT WAS PRESENT (APPELLANT BEING LONG IN THE LOCAL PRACTICE OF MEDICINE) AND BOTH FEDERAL AND CALIFORNIA COURT OF APPEAL HAVE RULED AGAINST LEVY BEFORE

JUDGMENT AND AN IMPORTANT CONSTITUTIONAL QUESTION STANDS:

Can the Federal Government Alone Use Such Levy In the State of California?

The Federal rule against prejudgment levy, *Smiadach v. Family Finance Corp.* 395 US 337 (1969) was adopted by California, *Randone v. Appellate Department* 5 C3 536, 559, extended to State Government, *People v. All State Leasing* 24 CA3 973 (1972).

II

1. The decision appealed from would make the Federal Administration a special souvereign contra to *Florida v. Mellon* 273 US 12; 2. invade judicial power contra to the *U.S. Constitution Art. III and Art. 1 sec 1-8 expressed by Kwai Chiu Yuen v. Immigration & Naturalization 395 US 908;* 3. and constitute more than mere procedure which should follow the law of the State. *Erie RR Co. v. Tompkins 58 S. Ct. 817*

III

The opinion appealed from held the matter decided by *Fuentes v. Shevin* 407 U.S. 67, 90-92 (1972), but only brief dictum on the point is present. Authority appears to be cited in said case by *Stanley v. Illinois* 405 US 645, 656, however the holding therein favors "the vunerable

citizen's rights over praiseworthy government officials" (footnote 27-28, page 576 U.S. Supreme Court Reporter) *Phillips v. Commissioner* 283 U.S. 589 (1931) never having upheld summary attachment where a corporation was not involved.

CONCLUSION

For the above reasons the petition for a writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLEMENT A. TAVARES and
ALICE B. TAVARES,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 72-1427

JANUARY 30, 1974

On Appeal from the United States District Court for the Eastern District of California

Before: MERRILL and WRIGHT, Circuit Judges, and KING,* District Judge

PER CURIAM:

Appellants-taxpayers protest the levy of the Internal Revenue Service upon bank accounts pursuant to notice of assessment following deficiency notice, all strictly in accordance with 26 U.S.C. §6331. Appellants contend that *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), requires that a judicial hearing be had prior to the taking of their property. The District Court ruled against this contention and granted summary judgment for the United States. We affirm.

*Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

The issue is foreclosed by *Phillips v. Commissioner*, 283 U.S. 589 (1931). There it was stated:

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained."

283 U.S. at 595. And, later:

> "(T)he right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery, is paramount."

283 U.S. at 599.

As recently as 1972 the Supreme Court has noted the distinction between *Sniadach*, which involved a private creditor, and *Phillips*, indicating that the former cast no doubt on the continued force of the latter. *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972).

Judgment affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-469

CLEMENT A. TAVARES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner filed this suit for a tax refund in the United States District Court for the Eastern District of California, alleging that the collection of the taxes pursuant to a levy denied him due process. The district court granted the government's motion for summary judgment and the court of appeals affirmed (Pet. App.). The judgment of the court of appeals was entered on January 30, 1974, and petitioner failed to obtain an extension of time for filing his petition for a writ of certiorari.[1] The petition was not

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[1]We have been advised by the Clerk of this Court that, prior to April 30, 1974, petitioner sent to the Court a document captioned "Petition for Writ of Certiorari" that was returned to him by the Clerk on the grounds (i) that it did not conform with the printing specifications of Rule 39 of the Rules of this Court and (ii) that it did not set forth facts showing that petitioner was entitled to proceed *in forma pauperis* under 28 U.S.C. 1915 and Rule 53 of the Rules of this Court.

filed until October 22, 1974, and is therefore out of time under 28 U.S.C. 2101(c). Accordingly, this Court is without jurisdiction to grant the petition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.